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No.

In The

Supreme Court of the United States

October Term, 1993

TUSKEGEE AREA TRANSPORTATION SYSTEM,
Petitioner,

vs.

OLIVER HOOKS, JR., an Individual and AMALGAMATED TRANSIT UNION LOCAL 1600,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTIONS PRESENTED

I. Whether an employer, charged with a discriminatory discharge in an unfair labor practices case based on union activities, must prove by a preponderance of the evidence that the reasons articulated are not a pretext?

II. Whether a "per se" rule exists regarding mandatory subjects of bargaining?

LIST OF PARTIES

The parties to the proceedings below are:

1. Tuskegee Area Transportation System.

2. Oliver Hooks.

3. Amalgamated Transit Union, Local 1600.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	1
A. A Minority-Owned Company Gets a Subcontract to Provide Supplemental Public Transportation Services.	1
B. The Subcontract Provided for a Part-Time Service.	2
C. The Unionization of TATS	4
D. Oliver Hooks: Extra Board or Extra Load	5
E. Two Meetings With the Drivers	8
F. A Substantial Increase in Costs	9
G. The MARTA Workers Walkout	10

Contents

	Page
Summary of Argument	16
Reasons for Granting the Writ	17
I. An employer, charged with a discriminatory discharge in an unfair labor practice case, must prove by a preponderance of the evidence that the reasons articulated are pretextual.	17
II. A "per se" rule exists regarding mandatory subjects of bargaining.	21
Conclusion	25

TABLE OF CITATIONS

Cases Cited:

Allied Chemical & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass, 404 U.S. 157 (1971)	24
Borel Restaurant Corp. v. NLRB, 676 FRD 190 (6th Cir. 1982)	20
Consolidated Edison Co. v. Donovan, 673 FRD 61 (2nd Cir. 1982)	20
Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964)	24
First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)	24

Contents

	Page
J.W. Mays, Inc., 147 NLRB 942 (1964), *enforced as modified*, 356 FRD 693 (2nd Cir. 1966)	24
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 247 (1977)	20
NLRB v. Blackstone Co., 685 FRD 102 (3rd Cir. 1982)	20
NLRB v. Fixtures Mfg. Corp., 669 FRD 547 (8th Cir. 1982)	20
NLRB v. Transportation Management Corp., 674 FRD 130 (1st Cir.), *cert. granted*, 103 S. Ct. 372 (1982)	19, 20, 21
NLRB v. Webb Ford Inc., 689 FRD 733 (7th Cir. 1982)	20
NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342 (1958)	24
NLRB v. Wright Line, 662 FRD 899 (1st Cir.)	20
Red Ball Motor Freight v. NLRB, 660 FRD 626 (5th Cir.), *cert. denied*, 102 S. Ct. 2282 (1982)	20
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	20, 21
Wright Line, 251 NLRB 1083 (1980)	20
Zurn Industries v. NLRB, 680 FRD 683 (9th Cir. 1982)	20

Contents

Page

Statutes Cited:

28 U.S.C. § 1254 1

29 U.S.C. § 158(a)(1)(3) 1, 16, 17

29 U.S.C. § 158(5) 1, 16

29 U.S.C. § 158(d) 24

APPENDIX

Appendix A — Per Curiam Order of the United States Court of Appeals for the Eleventh Circuit Entered December 20, 1993 ..... 1a

Appendix B— Per Curiam Order of the United States Court of Appeals for the Eleventh Circuit Entered September 30, 1993 ..... 3a

Appendix C — Decision and Order of the National Labor Relations Board Dated August 14, 1992 ..... 5a

Appendix D — Supplemental Decision of the National Labor Relations Board Dated March 6, 1992 ..... 19a

Appendix E — Decision of the National Labor Relations Board Dated May 7, 1991 ..... 25a

Appendix F — Relevant Statute 50a

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

No opinions were officially or unofficially reported in this case by any court or administrative agency.

STATEMENT OF JURISDICTION

(i) The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed herein was entered on September 30, 1993. (Appendix B, *infra*, page 3a).

(ii) A Suggestion of Rehearing En Banc filed with the United States Court of Appeals for the Eleventh Circuit was denied and judgment entered on December 20, 1993. (Appendix A, *infra*, page 1a).

(iii) The statutory provisions believed to confer on the Supreme Court jurisdiction to review the judgment of the United States Court of Appeals by Writ of Certiorari is Title 28 U.S.C. § 1254.

STATUTE INVOLVED

The statutory provision involved in this case is Title 29 U.S.C. § 158(a)(1)(3) and (5) of the National Labor Relations Act which is set forth in Appendix F, *infra*, page 50a.

STATEMENT OF THE CASE

A. A Minority-Owned Company Gets a Subcontract to Provide Supplemental Public Transportation Services.

Greyhound Lines, Inc. (hereinafter called "Greyhound")

reached a contract to provide supplemental bus service to the Metropolitan Atlanta Regional Transit System (hereinafter called "MARTA"). On June 10, 1988, Greyhound subcontracted a portion of that contract to the Tuskegee Area Transportation System (hereinafter called "TATS").

TATS was a small minority subcontractor that commenced business in 1986. John Wright was its president. The subcontract with Greyhound required it to provide bus service for MARTA, during peak transportation hours. Greyhound was to pay TATS a gross amount of about $600,000 over the three-year term of the subcontract. (Notes of Testimony 36).

In order to perform the service, TATS leased six buses from Greyhound with an option to purchase the buses at the end of the lease.[1] TATS' used a room in Greyhound's garage as its office. Greyhound sold maintenance, repair services and fuel to TATS.

Over three years, TATS would receive periodic payments, totalling $298,164. This was the amount for disbursement after Greyhound deducted lease payments, maintenance fees and other costs. During year one, TATS received $95,172; year two equaled $98,974; and year three totaled $104,018. The payments were made in monthly installments. From these amounts, TATS paid its administrative expenses. (Notes of Testimony 55, 97).

B. The Subcontract Provided for a Part-Time Service.

The subcontract involved three hours of bus service in the mornings and three hours in the afternoons. Wright and

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1. Greyhound filed for bankruptcy. Through MARTA, it modified the term of the contract to end one day early. It then locked TATS out of the facility, confiscated all six buses and declared the buses to be assets of the bankruptcy estate.

Greyhound trained the drivers. There were two bus routes: #718 and #148. Route #718 consisted of two buses in the morning and one in the afternoon.[2] Route #148 had three runs in the morning and three in the afternoon.[3] (Notes of Testimony 55, 97).

Wright made all decisions regarding the hiring and firing of employees. All of TATS' drivers were part-time employees.[4] The drivers received $90 per shift working one and a half hours a day to the maximum of three hours per day at a total of five days per week.[5] If they worked two shifts, they received $180 per week.

At first, Wright recruited drivers from the public and brought in drivers from Tuskegee, Alabama. He sought drivers who could work both the morning and afternoon shifts. He had difficulty finding drivers who could work both shifts, because it was part-time work.

In September 1988, TATS hired a driver, Oliver Hooks, who held full-time employment with MARTA. Hooks drove a morning route for TATS and became the morning supervisor. Hooks suggested that other MARTA drivers could also work either a morning or afternoon shift for TATS depending upon their MARTA schedules. Through Hooks TATS recruited other full-time MARTA drivers to work a single shift. In October 1988, it

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2. #718 started from Chamblee Station and traveled to Jimmy Carter Boulevard.

3. #148 began and ended at the Art Center Station (downtown) out to Power Ferry Road, its destination in the morning. (55).

4. "A. First of all let the record show that all my positions then and now are part-time positions. I have no full-time slots at all."

5. TATS paid its drivers at a higher rate than Greyhound and MARTA.

hired Reginald Wall.[6] In November 1988, it hired McKinley Woods.[7]

C. The Unionization of TATS

In December 1988, Wright learned from Hooks that the drivers were in the process of organizing a union.[8] They were "signing to show solidarity for the Greyhound drivers also." (Notes of Testimony 95).

The union election was held in March 1989. The vote took place in the one room at the Greyhound facility that served as TATS' office. Wright was there. The "government agent" who conducted the election asked him to leave the "polling area".[9] (Notes of Testimony 47).

On March 27, 1989, the union sent TATS a demand for recognition. Wright received the notice while in Tuskegee, Alabama. He telephoned several drivers at home inquiring about

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6. Wall drove for TATS in the mornings and for MARTA in the afternoons.

7. Woods drove for MARTA in the mornings and for TATS in the afternoons. Both he and Wall were members of the MARTA Local 732.

8. "Q. What did you tell Mr. Wright? A. I told Mr. Wright that the employees of Greyhound Transit that run the MARTA route were discussing a union and we're in the process of organizing a union. Mr. Wright replied that to me — his exact words — go ahead and do it. Greyhound's got plenty of damn money. Those are his exact words that he state to me."

9. "Q. Did the government agent conducting the election ask you to leave the polling area? A. Yes. I was inside it first. I wasn't aware that I couldn't be inside to observe. I was told I was supposed to be there to observe. No one informed me where. My presence was supposed to be in order to observe." (47-48).

their union positions.[10] (Notes of Testimony 42).

D. Oliver Hooks: Extra Board or Extra Load

TATS received several complaints about Hooks from customers. He drove the #718 in the morning.[11] Riders complained that he did not pull out of Chamblee Station on time. He sat across the street, drinking coffee or eating. He was rude. He intimidated female customers when they asked him to wait or stop. He wouldn't stop at designated stops.[12] (Notes of Testimony 244, 248).

Darice Gamble,the contract coordinator for MARTA, initiated

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10. "Q. What did you say? A. When I received the letter I was in Tuskegee. I called a couple of drivers and prior to that I had asked them about their union position, just a general conversation of how they really felt about it. I said if y'all want a union, fine. I have no problem with that because each person is entitled to representation.

But I feel that the open door policy that we have that each man can speak for himself and I will be willing to hear what you have to say or any complaints and move accordingly. So when I got the list of drivers, I went through the list and I called, I think, two of them and I asked them what is this all about. I thought y'all said y'all was happy with the way things was going. I said the union itself will place some unnecessary burdens on me that will put he (sic) out of business.

So therefore, that the money is not here and Greyhound is not paying me enough money as of this date to support the drivers in this kind of operation. I am putting other monies in to make this thing work.

That's basically the conversation that I had with the drivers, to find out where they were coming from as far as what were they really asking for. There hadn't (sic) anyone said anything to me about any kind of demands." (282-283).

11. His entire shift consisted of a round-trip that took about one and a half hours.

12. Wright related the following:

"THE WITNESS: That there were some mornings that he did not pull into

(Cont'd)

several conversations about an "ongoing" complaint regarding Hooks from TATS customers.[13] She felt that the complaints "warranted attention." Gamble wanted Wright to terminate Hooks.[14] When she learned (from Wright) that Hooks was also a

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(Cont'd)
the Chamblee station when he first arrived. They indicated that he was sitting across the street. He'd be drinking coffee or eating a sandwich. Several of the other customers indicated that he would intimidate some of the female customers because of their asking him either to wait or stop at a bus stop. They replied that we know where you — They said Oliver said I know where you stop and I just stop automatically. One morning he stopped and another morning he wouldn't stop. They also complained about his attitude. They said he was very — had a very nasty attitude towards some of the employees. They feel that they shouldn't have to humble themselves unto him to get him to be cordial."

13. Hooks' version appears on pages 98-104 of the transcript.

14. "Q. From whom did you receive your complaint about Mr. Hooks? A. The one I received — The last one that we had to take action on came from Darice Gamble.

Q. Who is she? A. She is the contract coordinator for MARTA.

Q. Did she give you an ultimatum? A. Yes she did.

Q. What was your ultimatum or what were your ultimatums? A. When I — Johnnie — Ms. Wilcots first called me when she got the notice from Joe Hall that there was a serious complaint.

THE COURT: That's not the question. The question is were you given an ultimatum by MARTA?

THE WITNESS: Right.

THE COURT: What were you told?

THE WITNESS: To terminate Oliver Hooks." (248).

MARTA driver, MARTA also investigated Hooks.[15]

Wright chose to investigate the complaints before making a decision about Hooks employment status. He performed an on-site investigation at Chamblee Station. He concluded that there were grounds to remove Hooks from his route, pending the completion of his investigation. On March 16, 1989, he transferred Hooks to "Extra Board", so that he could continue to work for TATS.[16] (Notes of Testimony 97-99, 247-251, 378-379).

On March 31, 1989, Wright was forced to drive #718 because Hooks was suspended from #718 and there was no backup driver.[17]

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15. "A. Yes. From the standpoint of did we ever have any complaints on record regarding Oliver Hooks. Because upon discussion with Tuskegee and Greyhound, they in fact informed me that he was a part-time bus operator with MARTA. I was checking to see if we had any complaints regarding his employment with us. So I did look into that.

Q. And he didn't have any complaints, did he? A. It was just a minor one. And there was — The division manager at the time indicated that he called him in his office and it was just an oral reprimand. After that there were no other problems with the employee."

16. Extra Board was the backup driver for a shift. The position was required under the subcontract. The Extra Board driver was paid the same shift rates as regular drivers. He reported to work every day. When all of the drivers reported, he was sent home. If a driver was absent, he drove the route. After the last run that began at 7:15 in the morning, he could leave for the day. (251).

17. Wright testified as follows:

"Q. After your investigation what did you do? A. After we started the investigation we found out there was some substantial reason to suspend him or take him off the route. The ultimatum in the beginning was to terminate him.

(Cont'd)

Since there was no reason to pay Hooks when he could not perform his duties, Wright suspended him, pending the final outcome of the investigation of the customer complaints.[18] (Notes of Testimony 100-103, 247-250).

E. Two Meetings With the Drivers

On March 31, 1989, Wright had a staff meeting with TATS' drivers on a bus at Shoney's. Although TATS suspended him that morning, Hooks attended the staff meeting with Wright's permission.[19] He questioned Wright about TATS' incentive pay policy.[20] (Exhibit 15) (Notes of Testimony 105-120).

(Cont'd)
Then I suggested we take him off route 718 and put him on another route. But meanwhile, all the other routes were assigned and I just couldn't remove another individual to make room for Oliver. I told him I would put him on Extra Board so he could continue to work, so he could back up the other drivers as needed. Then at that time we had some absenteeism on 718 which I couldn't allow him to drive, but I did allow him to go out one morning because either we allowed him to drive or we decided for a missed run. He did drive subject to that.

18. On that morning, testified Hooks, "when I got to work, Mr. Wright told me that I no longer would be able to work because he needed someone that could run all of the routes. And at the present time due to his present investigation, I was unable to run the routes. He was suspending me until this investigation was over." Wright then handed Hooks a letter of suspension (Exhibit 15) (105-106).

19. "A. That was after my suspension where they were having an employee meeting and all the employees met at the garage and so did I. I asked Mr. Wright would it be all right if I go to the meeting with them, and he said yes. So I got on the bus with all the other employees and went to Shoney's." (107).

20. "A. Yes, We was talking about the working conditions and things we was promised about incentive. I asked a question to Mr. Wright about the incentive program that I had duly earned by being present at work everyday, not being late, and my performance. We was promised that if we be there x number of months without missing any days from work— without being late —that we would get a bonus. (107-108).

On April 9, 1989, Wright held another meeting with the drivers. He was concerned about the friction between the non-MARTA drivers and the MARTA drivers. The "morale of drivers had dropped to the point where there was a lot of harassment going on and a lot of other intimidating activities going. So I had to make a move at that particular time." (Notes of Testimony 63, 66, 271). Wright spoke of the drivers trying to work together:

> . . . we're all supposed to be working as a team, that this operation is not just a dollars and cents. TATS is not making any money. I explained to all the drivers that this is mostly a movement type situation. We are trying to live out the dream of Dr. Martin Luther King by showing the world that Atlanta can have one of the best minority contractors in this country. We are — The spot light is on Atlanta as far as being able to provide the kind of professional services that can be provided in the area of transportation.

(Notes of Testimony 64-66).

F. A Substantial Increase In Costs

On November 16, 1989, TATS was notified that its workers compensation premium was re-calculated to reflect the number of drivers it employed. The rates increased from $2,418 per annum to $11,644 for the first seven months of 1990. This substantial increase was the result of TATS implementation of split shifts, *i.e.*, hiring two drivers to handle the work of one driver.[21] TATS "could not afford it." (253-255).

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21. "Q. Okay. Now, this increase worker's compensation, how does the — how does an insurance company decide what they're going to charge you for (Cont'd)

On November 28, 1989, Wright sent a letter to the TATS drivers who worked a single shift. The letter stated:

> I am writing this letter to inform you that due to the increased cost of workmen's compensation insurance and TATS inability to secure an increase in operating capital from GLI, we must cut back in staff by employing persons who can work both, the morning and evening, shifts. If you feel that your schedule will allow you to work both shifts, please contact me immediately for consideration. If not, you will be allow (sic) to work until a replacement if (sic) found.
>
> I want to take this opportunity to thank you for the service you have rendered to the Tuskegee Area Transportation System, and I look forward to a continue (sic) good working relationship.

(Notes of Testimony 252) (Exhibit 2) (Exhibit 3).

G. The MARTA Workers Walkout

In June 1989, four months before TATs received the notice of increased worker's compensation premiums, Wall became the

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(Cont'd)

worker's compensation? A. By the number of employees you have and by the payroll. Mostly by the number of employees because the least amount of employees, the least — How they put it. Your responsibility drops to the insurance company. If you go from ten employees to five employees maybe the payroll will be the same but you have less amount to occur because of the amount of people that's involved. That type of situation.

morning supervisor. Through Wall, TATS hired three more MARTA drivers.[22] In June 1989, it hired Lewis Mobley[23] and Jerome Hammond.[24] In July 1989, it hired George Derrick Huff.[25] These four drivers walked off the job after they received the letter written by Wright on November 28, 1989. (Notes of Testimony 123, 124, 141-142, 158, 173).

On Wednesday, November 29, 1989, Huff received his letter. He called off work on Thursday. He testified that "I wasn't fired from what I understood so I called in on Thursday." (259).

On Thursday, November 30, 1989, Wright received a telephone call, advising him that there were drivers who would not show up on Friday. Wright put himself on standby, as a driver. He alerted a supervisor, Pat Williams, to let him know of any unusual happenings. He wrote to Cliff Franklin, notifying Greyhound of the possibility of a wildcat strike. (Notes of Testimony 260, 287, 258, 259).

On Friday, December 1, 1989, Williams, the TATS' operations manager, heard the morning supervisor, Wall, say he wasn't going on the road. He walked off the job and went home. This caused TATS to miss a scheduled run. Williams called Wall and told him to

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22. They were members of the Local 732 at MARTA.

23. Mobley had two years experience as a part-time bus operator for MARTA in the afternoons. He drove for TATS in the morning. He testified that: "I told him that I had to work in the evenings for MARTA and in the morning I could work in the morning time. That's why he hired me, to work in the mornings." (149).

24. Hammond also had two years experience as a driver for MARTA.

25. Huff drove part-time for MARTA.

return the radio. When he did not bring it back, Wright sent the Atlanta police to get the radio. (Notes of Testimony 353-358).

Some drivers did not come in to work while the other drivers drove their routes. Wright requested that Greyhound loan TATS a backup driver. Greyhound sent their backup driver home. (Notes of Testimony 260).

On December 1, 1989, Hammond maintained that when he arrived at work at 6:30 a.m. the buses were gone. Wright told him that everything was covered. He waited until 8:25 a.m. when his run was to end.

When Huff reported to work, he testified that he was told that his run was filled. A supervisor suggested that Huff talk to Wright but Huff made no such attempt. He stayed until noon.[26] He drove to various sites (Gresham Road, Atlanta Coast, etc.), before he saw the buses. He then went home.

Some of the drivers apparently met between Friday and Monday to discuss a protest. Hammond could not remember any meeting. Huff said the drivers met between Friday and Monday to discuss the "possibility of striking." None of the drivers talked to the union about the situation at TATS or their planned job action. (Notes of Testimony 185).

On Sunday, December 3, 1989, Wright received a telephone call from one of the drivers, Earnest Jackson. Jackson informed him that the MARTA drivers would not show up to work on Monday but would set up picket lines. They planned an altercation with the non-striking drivers. (Notes of Testimony 261-262).

Wright informed Greyhound's headquarters in Dallas,Texas

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26. He usually got off at 10:00 a.m.

of the impending situation.[27] Cliff Franklin, of Greyhound, directed Wright to meet with Joe Hall and move the buses to a new location.[28]

Wright and Hall met at 4:30 a.m. Hall signed on as a driver for TATS. Six buses were moved to a Gresham Road site to avoid incidents. (Notes of Testimony 262) (Exhibit 5).

On Monday morning, Wright left the Greyhound facility with three drivers [Earnest Jackson, Richard Ragland and Charlie Osborne] in his car. They were going to the site where the buses had been moved. As he was leaving, Wright saw the morning supervisor, Wall, with four drivers: Hooks, Huff, Hammond and Mobley. They walked back and forth carrying picket signs saying **"Unfair Dismissals".**[29] They were singing: "John Wright got to go", and calling him a pig, etc. (Notes of Testimony 149, 264-268)

The sign-in sheet was in the drivers' lounge. None of the striking drivers signed in to work. Huff testified that he saw Wright leaving the Greyhound facility with people in his car. Mobley said that no one was there. He stayed there with Wall, Hammond and

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27. Under the subcontract, TATS was required to house the buses in the Greyhound facility.

28. The contract required that TATS house the buses in the Greyhound facility.

29. "THE COURT: Do you recall what they said?

THE WITNESS: Unfair labor practices. John Wright must go. TATS in big letters across the middle. We had TATS, T-A-T-S (spelling), unfair labor practices. TATS, John Wright must go. That was the wording." (Page 171, lines 10-17).

Huff and they discovered that the buses were gone.[30]

He went to Joe Hall's office, to find out where the buses were located. He was prepared to either work or walk the picket line.[31]

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30. Lewis Mobley testified:

"Q. Did you at some time later find out where the buses had been taken? A. Yeah, out to Decatur.

Q. Did Respondent move the buses? A. Yeah, he moved the buses. And John Wright had all the other drivers in his car taking them to where the buses were as they came to work that morning." (Page 154, lines 13-20).

31. Lewis Mobley testified:

"Q. Why did you show back up at work on Monday? A. Because he didn't come out and exactly say you're fired. So we decided we needed to come to work and be prepared to go to work in case he tried to say we walked out or something like that." (Page 153, lines 3-8).

"THE COURT: Reading between the lines — and that's what I'm doing here —I get the impression that you went to work that morning not knowing for sure whether you would actually work?

THE WITNESS: Yes.

THE COURT: I take it from your testimony what you're telling me is that you went there with the intention if you had a job, you had a route, you were going to work?

THE WITNESS: Yes, sir.

THE COURT; But if you didn't have a job, you had these picket signs ready that you were going to picket; is that right?

THE WITNESS: That's exactly right." (Page 156, lines 9-25).

Lucille Horton, a TATS' driver, arrived at 5:30 a.m. She tried to enter the Greyhound facility so that she could report to work. She saw four or five men, on the outside of the fence, carrying signs. She recognized Hooks. He was talking about Wright and about the other drivers. He did not get a chance to talk to Horton because she told him not to say anything to her.

Horton did not go into the facility. After talking to a security guard, she backed up at the gate, turned around and went home. She telephoned the Greyhound facility and eventually talked to a secretary for Atlanta Coach. The secretary told her that: "The part-time MARTA drivers walked off and went on strike." (Notes of Testimony 267, 360, 372).

Huff said that Hammond made the picket signs. Mobley said he did not have a picket sign when he went to work.[32] He said that Hammond made the picket signs. Hammond testified that neither he, nor any of the other drivers, showed up with picket signs.[33]

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32. The court recalled Mobley "to clarify something." Mobley repeated that Hammond made the picket signs.

33. "THE COURT: And you're sure that you did not show up with picket signs in your trunk just in case you didn't have a job?

THE WITNESS: Absolutely not.

THE COURT: You didn't?

THE WITNESS: None of us did.

THE COURT: You're sure of that?

THE WITNESS: Absolutely, sir, because I'm the one that had to make up the picket signs." (Page 167, lines 15-24).

Wall, Hammond, Huff and Mobley never returned to work for TATS. (Notes of Testimony 151, 153, 172-174).

Local 1600 alleged that TATS violated Sections 8(a)(1), (3) and (5) of the Act. It alleged that TATS interrogated employees about their union activities, solicited grievances, threatened employees and changed their work schedules, in violation of Sections 8(a)(1), (3) and (5) of the Act.

TATS denied engaging in unfair labor practices. It raised the issue of discretionary jurisdiction.

SUMMARY OF ARGUMENT

This case involves two situations. The first occurred in March 1989, when an employee named Oliver Hooks was suspended from the work force. The second occurred on or about November 28, 1989 when TATS notified those drivers who worked a single shift that it was discontinuing the practice of allowing drivers to work a single shift.

Neither management nor labor should dominate the workplace through bureaucratic interference. Bargaining should be compelled only when it will result in decisions that are better for management, labor and society as a whole.

REASONS FOR GRANTING THE WRIT

I.

AN EMPLOYER, CHARGED WITH A DISCRIMINATORY DISCHARGE IN AN UNFAIR LABOR PRACTICE CASE, MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE REASONS ARTICULATED ARE PRETEXTUAL.

On June 7, 1989, Oliver Hooks filed a complaint with the NLRB alleging that TATS violated sections 8(a)(1) and (3) of the Act. He claimed that TATS discharged him because of his union activities.

Hooks' case was based on the testimony of three witnesses: Hooks, McKinley Woods and Darice Gamble. Hooks testified that, in their discussion of the union, Wright said: "go ahead and do it. Greyhound's got plenty of damn money."[34] Another witness, McKinley Woods, testified that he had received a telephone call from Wright shortly after the union election, in March 1989, and that Wright questioned him about the need for a union at TATS.

TATS' defense was that it received complaints and the contractor, MARTA, also received complaints from customers about Hooks. MARTA wanted TATS to fire Hooks, but Wright chose to suspend him pending an investigation. Wright's investigation prompted him to remove Hooks from his route.

Hooks admitted that he had problems on the job and acknowledged that Wright discussed those problems with him. Wright told him that he was being suspended because "he needed someone that could run all the routes."[35]

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34. *See* footnote 8.

35. *See* footnote 18.

At the very end of the two days of hearings, the NLRB brought in a surprise witness, Darice Gamble, the MARTA contract coordinator. She vaguely remembered initiating several telephone conversations with Wright and a Greyhound representative after she received an ongoing complaint about Hooks.[36] She denied telling Wright to fire Hooks.

In finding that TATS committed an unfair labor practice, the Administrative Law Judge wrote

> I found Gamble totally candid and credible. I conclude that she never directed or even suggested to Respondent that it terminate Hooks. I conclude as well that Wright simply lied about that [the MARTA request that he fire Hooks] in order to build a smoke screen behind which he might hide. The false testimony proffered by Wright itself warrants an inference that his motive for terminating Hooks was unlawful.

Of course, the Administrative Law Judge did not know

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36. "A. I vaguely remember having a conversation with them.

Q. Do you remember vaguely the content of the conference call, what you talked about. A. I can't — I don't want to rely solely on my memory. It's been so long ago. It seems that there were several telephone calls that we had regarding Oliver Hooks.

Q. Was it a serious complaint? A. The complaint was a complaint — I wouldn't say a rather standard complaint but it seems that this was the second complaint that had been received. I think the initial complaint we did not know who the bus operator was. But after the second complaint came in, I immediately as I said talked to Greyhound and Tuskegee indicating that we had a complaint. This was the second complaint on that route and the matter needed to be investigated." (Notes of Testimony 381-382).

whether Wright's testimony was false. He overlooked the fact that Wright investigated the complaints that were received about Hooks. He simply chose to believe Gamble over Wright on the subject of whether MARTA wanted Hooks' employment with TATS terminated. The record does not indicate that Wright needed MARTA's permission to fire Hooks. Therefore, it is unclear why the Administrative Law Judge believed that Wright needed a "smoke screen" to justify the supervision of his own employees.

The board drew an impermissible inference from Wright's testimony. It could have just as easily inferred that Gamble falsified her testimony about not pressuring Wright to fire Hooks. After all, Hooks was also a union officer at MARTA. MARTA could have wanted to use TATS to retaliate against Hooks. Gamble claimed that she did not know that Hooks worked for MARTA, until Wright told her. Gamble made several telephone calls to TATS inquiring about Hooks. If the complaint that MARTA received about Hooks was just a routine complaint, Gamble would have simply forwarded the information to TATS. She never did say what the complaint she received about Hooks entailed. (Notes of Testimony 381).

This case illustrates a situation in which the employer cannot rebut a prima facie case, regardless of the burden the employer bears. The mere assertion of a pretext denigrated TATS' business justification for suspending Hooks. The appellate court placed little weight on TATS' articulation of a legitimate basis for the employment decision.

The Supreme Court's grant of certiorari in *NLRB v. Transportation Management Corp.*, 674 FRD 130 (1st Cir.), *cert. granted*, 103 S. Ct. 372 (1982) attempted to resolve the issue of the appropriate employment discrimination burden of proof applicable to dual motive unfair labor practice cases.

Prior to that time, the leading case was *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In that case, the employee had the burden of showing that his conduct was constitutionally protected and that it was a substantial factor in the employer's decision. If the employee carried that burden, the employer was required to show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct. *Id.* at 287. In *Wright Line*, 251 NLRB 1083, 1089 (1980), the board set forth a similar test.

The *Wright Line* analysis was followed in *Red Ball Motor Freight v. NLRB*, 660 FRD 626 (5th Cir), *cert. denied*, 102 S. Ct. 2282 (1982); *Borel Restaurant Corp. v. NLRB*, 676 FRD 190 (6th Cir. 1982); *NLRB v. Fixtures Mfg Corp.*, 669 FRD 547 (8th Cir. 1982); and *Zurn Industries v. NLRB*, 680 FRD 683 (9th Cir. 1982).

Other courts concluded that *Mt. Healthy City School District Board of Education v. Doyle, supra,* required an impermissible shifting of the burden of proof to the employer. These courts generally followed the criteria set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) that the employer is required to "articulate", rather than prove", its legitimate reasons for its action once a prima facie case had been presented. *NLRB v. Wright Line*, 662 FRD 899 (1st Cir.); *NLRB v. Blackstone Co.*, 685 FRD 102 (3rd Cir. 1982); *NLRB v. Webb Ford Inc.*, 689 FRD 733 (7th Cir. 1982); and *Consolidated Edison Co v. Donovan*, 673 FRD 61 (2nd Cir. 1982)

In *NLRB v. Transportation Management Corp., supra*, the court held that, if an employer discharges an employee because of union activities, or if the proffered reasons are pretextual, the employer has committed an unfair labor practice. If anti-union animus that the employer might have entertained did not contribute to an otherwise lawful discharge for good cause, the employer did not violate the Act.

However, the decision in *NLRB v. Transportation Management Corp., supra*, ignored an important issue involving the balancing of the employer's and employee's interests. There is a difference between a pretextual reason, as set forth in *Texas Department of Community Affairs v. Burdine, supra,* and a valid business justification that the employer is unable to show was the "but for" motivation, as set forth in *NLRB v. Transportation Management, Corp., supra*. The distinction between pretext cases and dual motivation cases has become blurred.

In the latter situation, the inability is relevant to causation, but it does not relieve the board from considering the justification by balancing the employer's and employee's interests. In contrast, the court in *Texas Department of Community Affairs v. Burdine*, held that when discrimination is established "inferentially", the employer rebuts the inference by articulating a legitimate reason, *supra* at 257.

By articulating a legitimate reason, TATS demonstrated that a valid explanation replaced the impermissible one inferred from the prima facie case. The employee should have produced either direct evidence of discrimination or demonstrated the pretextual nature of TATS' asserted justification. Hooks neither demonstrated pretext nor produced direct evidence of discrimination. He should have shown that he was not transferred because of customer complaints. The Administrative Law Judge should have only determined whether the reason given was a legitimate reason. The fact that he chose to believe Gamble does not demonstrate pretext.

II.

A "PER SE" RULE EXISTS REGARDING MANDATORY SUBJECTS OF BARGAINING.

On January 18, 1990, Amalgamated Transit Union Local 1600

(hereinafter referred to as "Local 1600") filed Case No. CA 10-CA-24554 against TATS. The complaint was amended on January 31, 1989 and again on February 23, 1990. On December 17, 1992, Case No. 926782 was consolidated with Case No. 92-6931.

TATS was a small minority contractor that received a meager portion of a major contract to satisfy a minority participation quota. The subcontract was TATS primary source of revenue. The subcontract did not allocate sufficient funds for TATS to hire full-time drivers.

During the first year of the subcontract, TATS had difficulty finding enough drivers to work the part-time schedule. Through Hooks, it hired a few MARTA drivers to work a single shift. After Hooks was suspended, another MARTA employer, Reginald Wall, became the morning supervisor. In June 1989, TATS hired three more MARTA drivers, Huff, Hammond and Mobley. The record does not disclose whether TATS knew that they were members of the union at TATS or whether TATS wanted to remove them from the payroll because of their union activities. These four drivers walked off the job when TATS notified them of the elimination of the split shift.

TATS presented evidence that the decision to eliminate split shifts was economically motivated. There was a need for immediate action to rectify the situation.

The Administrative Law Judge concluded that TATS discriminatorily and unilaterally changed the work schedule, resulting in their termination, *i.e.*, "Respondent knew that by limiting employment to persons who could work both the morning and evening shifts, its employment of full-time MARTA drivers would be eliminated."

Proof of TATS's motive was not considered necessary[37]:

> . . . that it was not necessary to determine whether, under a section 8(a) (3) analysis, the employees might have been terminated . . . unilaterally and still in violation of Section 8 (a)(1) and (5) of the Act.

Decision, p. 2.

TATS is a small business trying to survive in a society that has recognized the need for minority participation programs. As is often the case, this is a situation in which that participation consisted of giving TATS the most undesirable portion of a project. TATS was expected to fail either because the contract was unworkable or because of the sophistication of a few employees who staged an unfair labor practice.

TATS has now been ordered to pay salaries to employees it could hardly afford to pay, even before the workers' compensation premiums increased. The result is that a small minority business has been bankrupted because of a bureaucratic interference that did not take into consideration the facts and circumstances surrounding the situation.

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37. The Administrative Law Judge concluded that TATS showed its hostility towards the union by "interrogating employees" and "soliciting grievances." This is a reference to an incident that occurred on or about March of 1989. Shortly after receiving the union's demand for recognition, Wright reacted by calling an employee, McKinley Woods, at home. Woods testified that Wright questioned him about his union position. That was an isolated incident. Huff, Hammond and Mobley were not even employed by TATS when the incident occurred. The record does not show any other conduct, on the part of TATS, that could reasonably by interpreted as showing animus towards the union. The record does not contain any reference to the union activities of Huff, Hammond or Mobley, before they walked off the job.

The union did not take the opportunity to request bargaining or attempt to propose alternatives. Instead, the four MARTA drivers abandoned their employment so that they could claim the benefits of a constructive discharge. It is inconceivable that TATS hired Huff, Hammond and Mobley and constructively discharged them four months later because of their union activities. They were only concerned that they had to give up their part-time jobs. Their claimed suspicions about TATS' motive was the sole basis for their charge. That is not enough to prove an unfair labor practice. *See e.g., J.W. Mays, Inc.,* 147 NLRB 942, 944 (1964) *enforced as modified,* 356 FRD 693 (2nd Cir. 1966).

The act provides that the duty to bargain applies to "wages, hours and other terms and conditions of employment. 29 U.S.C. § 158(d). The Supreme Court has distinguished between mandatory and permissive subjects of bargaining. *NLRB v. Wooster Division of Borg Warner Corp.*, 356 U.S. 342 (1958).

Mandatory subjects of bargaining fall within the scope of section 8(d). Employers have no duty to bargain over changes related to permissive subjects. *See Allied Chemical & Alkali Workers Local No. v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 158-159, 187-189 (1971).

Permissive subjects have been defined as "managerial decisions fundamental to the basic direction of a corporate enterprise." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964). Decisions that focus only on "economic profitability" are permissive subjects, even if the decision results in the discharge of employees. *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 677 (1981).

While the decision to eliminate split shifts may be construed as mandatory, this was an emergency financial situation. The increased insurance rates were a threat to TATS' very existence as a

business. Wright's letter of November 28, 1989, was notice of the decision to make a change because of the financial emergency.

CONCLUSION

For the reasons set forth above the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MATTHEW E. JACKSON, JR.
Counsel of Record
VELMA L. JACKSON
Attorneys for Petitioner

APPENDIX A — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ENTERED DECEMBER 20, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6782
92-6931

TUSKEGEE AREA TRANSPORTATION SYSTEM,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Appeal from the United States District Court of the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH and BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

Appendix A

* * *

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

ENTERED: December 20, 1993

APPENDIX B — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ENTERED SEPTEMBER 30, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6782

NLRB Nos. 10-CA-24176, 10-CA-24554

TUSKEGEE AREA TRANSPORTATION SYSTEM,

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 92-6931

NLRB Nos. 10-CA-24176, 10-CA-24554

NATIONAL LABOR RELATIONS BOARD,

Petitioner

versus

TUSKEGEE AREA TRANSPORTATION SYSTEM,

Respondent

Appendix B

Application for Enforcement of an Order
of the National Labor Relations Board

Before KRAVITCH and BLACK, Circuit Judges, and DYER, Senior Circuit Judge

PER CURIAM

ENFORCED. *See* 11th Cir. R. 36-1.

"Cost taxed against petitioner."

Judgment Entered: September 30, 1993
For the court: Miguel Cortez, Clerk

By:_____
Deputy Clerk

ISSUED AS MANDATED:

APPENDIX C — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED AUGUST 14, 1992

308 NLRB No. 47

D--3047
Atlanta, GA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 10—CA—24176
Case 10—CA—24554

TUSKEGEE AREA TRANSPORTATION SYSTEM

v.

OLIVER HOOKS, JR., an Individual and AMALGAMATED TRANSIT UNION, LOCAL 1600

DECISION AND ORDER

On May 7, 1991, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief. On November 19, 1991, the Board remanded the proceeding to the administrative law judge for further findings and the issuance of a supplemental decision. On March 6, 1992, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The board has considered the decisions and the record in light

of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings[2] and conclusions[3] as modified and to adopt the recommended Order as modified.[4]

The judge, citing *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), found that the Respondent violated Section 8(a) (5) and (1) by unilaterally changing its work rules to require employees to work both the morning and afternoon shifts, thereby effectively

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1. We have not considered the evidence submitted with the Respondent's exceptions to the judge's supplemental decision and brief. That evidence is outside the record.

2. The respondent has excepted to some of the judge's credibility findings. The board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F 2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent asserts that the judge's finding are a result of bias and prejudice. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

In agreeing with the judge's jurisdictional findings, we note that the issue of whether the Respondent filed Federal income tax returns is now a matter of public record and best left to the Internal Revenue Service, which will be furnished a copy of this decision. See *Original Oyster House*, 281 NLRB 1153 fn. 1 (1986), end. 822 F. 2d 412 (3d Cir. 1987); *Hacienda Hotel & Casino*, 279 NLRB 601 fn. 4 (1986).

3. We agree with the judge's conclusion that the Respondent's March 31, 1989 conduct with respect to employee Oliver Hooks violated Sec. 8(a) (3) and (1) of the Act, but we find that Hooks was indefinitely suspended rather than discharged.

4. We shall amend the judge's conclusions of law and remedy and modify his recommended Order to conform to the violations found.

terminating employees Lewis Mobley, Jerome Hammond, and Jorge Huff. Although finding merit in the General Counsel's contention that a discriminatory motive was at least part of the reason for the Respondent's unilateral change, the judge found that it was not necessary to determine whether, under an 8 (a) (3) analysis,[5] the employees might have been terminated even if the absence of an unlawful motive because "it is clear that employees would have been terminated . . . unilaterally and still in violation of Section 8 (a) (1) and (5) of the Act." The judge concluded that the Respondent violated Section 8 (a) (5), (3), and (1) by discriminatorily and unilaterally changing the work schedules of the employees, which resulted in their terminations. We agree with the judge's conclusion that the Respondent's unilateral change in shift schedules and the resulting terminations violated Section 8 (a) (5) and (1), but we do so only for the reasons set forth below.

At all relevant times, the Respondent subcontracted with Greyhound Lines, Inc. to provide morning and afternoon rush hour bus service on two routes of the Metropolitan Atlanta Rapid Transit Authority (MARTA).[6] To obtain qualified drivers, the Respondent employed drivers who worked full time for MARTA and who, depending on their schedules, would drive either the morning shift or the afternoon shift for the Respondent.[7] These MARTA drivers included employees Mobley, Hammond and Huff.

The Union was certified as the collective-bargaining representative of the Respondent's unit employees on September

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5. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

6. The Respondent also operated a charter bus service.

7. The Respondent also employed drivers who were able to drive both shifts.

18, 1989.[8] About November 16, the Respondent received notice of an increase in its workmen's compensation insurance premiums. Thereafter, on November 28, the Respondent sent a letter to each of its MARTA employees stating, in pertinent part, that due to the increased cost of insurance, "we must cut back in staff by employing persons who can work both shifts."[9] The MARTA employees were not able to work both shifts, and their employment with the Respondent ceased.

As found by the judge, the Respondent sent this letter without giving the Union prior notice or an opportunity to bargain. There can be little doubt that the matter of shifts is a mandatory subject of bargaining. *Georgia Pacific Corp.*, 275 NLRB 67.69 (1985) (citing *Meat Cutters Local Union 189 v. Jewell Tea Co.*, 381 U.S. 676, 691 (1951)). Although the Respondent contends that its decision to require employees to work two shifts was an economic one based on "a fair prediction of the natural consequences of being unable to pay the increase in Workers Compensation insurance and salaries," we note that an employer's obligation to bargain about changes in wages, hours, and terms and conditions of employment is not excused by economic expedience, even in good faith. *Master Slack*, 230 NLRB 1054 (1977), enfd. 618 F. 2d 6 (6th Cir. 1980).[10] We therefore find, in agreement with the judge, that

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8. All dates are in 1989 unless otherwise indicated.

9. The record contains copies of the letters sent to Hammond and Huff, the text of which is set forth in full in the judge's supplemental decision. Mobley testified that he received a letter like that sent to the other MARTA employees.

10. The Respondent has not demonstrated compelling economic circumstances as of November 28 that would justify its changing shift requirements unilaterally, without giving the Union an opportunity to bargain over a proposed change. Cf. *Aquaslide 'N' Dive Corp.*, 281 NLRB 219 fn. 2 (1986).

the Respondent violated Section 8 (a) (5) and (1) by unilaterally changing its work rules to require employees to work both the morning and afternoon shifts.

The Board has applied the following test for determining whether discharges or other forms of discipline violate Section 8 (a) (5) of the act: if an employer's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8 (a) (5). See *Equitable Gas Co.*, 303 NLRB No. 136, slip op. at 19 fn. 29 (July 31, 1991), enf. denied on other grounds 140 LRRM 2521 (4th Cir. 1992); *Great Western Produce*, 299 NLRB No. 154, slip op. at 6 (Sept. 27, 1990). In *Equitable Gas Co.*, above, the Board applied this test where, although the complaint did not specifically allege that employee McHale's discharge violated Section 8 (a) (5), the complaint alleged and the General Counsel proved that the relevant appearance guidelines were unlawfully and unilaterally implemented in violation of Section 8 (a) (5). In view of the evidence that McHale was disciplined and discharged pursuant to those guidelines, the Board further found that the Respondent's discipline and discharge of McHale also violated Section 8 (a) (5).[11]

Here, the complaint did not specifically allege that the terminations of employees Mobley, Hammond, and Huff violated Section 8 (a) (5). However, as in Equitable Gas Co., above, the complaint alleged and we have found that the Respondent violated Section 8 (a) (5) by unilaterally changing its work rules to require

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11. In denying enforcement, the court did not disagree with the Board's test for determining whether discharges violate Section 8 (a) (5). Rather, the court found that the Respondent lawfully adopted the appearance guidelines as part of a program to upgrade its public image.

its employees to work two shifts. We further find, for the reasons set forth by the judge, that the unlawfully imposed work rules were a factor in the terminations. In this regard, the judge in his decision rejected the Respondent's contentions that its November 28 letter to the MARTA employees was intended only to generate discussion, that the Respondent intended to retain all the MARTA drivers but to place them on charter bus routes, and that the MARTA drivers were never terminated but were permanently replaced when they went on strike in early December. Rather, the judge found that the November 28 letter effectively terminated the employment of the MARTA drivers who were unable to work both shifts. Under the circumstances, we find that the Respondent violated Section 8 (a) (5) and (1) by terminating employees Mobley, Hammond, and Huff. See Equitable Gas Co. and *Great Western Produce*, above.[12]

Amended Conclusions of Law

Substitute the following for Conclusions of Law 6 and 7.

"6. The Respondent indefinitely suspended employee Oliver Hooks because of his activities on behalf of and his support for the Union in violation of Section 8 (a) (3) and (1) of the Act."

"7. After the Board certified the Union on September 18, 1989, as the exclusive collective-bargaining representative of its unit employees, the Respondent, without notifying the Union or giving it an opportunity to bargain, unilaterally changed its work rule to require employees to work both the morning and afternoon

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12. We find it unnecessary to pass on the complaint allegation that the terminations also violated Section 8 (a) (3) and (1) as the remedy would not substantially be affected. Cf. *Chef's Pantry*, 274 NLRB 775 fn. 6 (1985).

shifts, thereby terminating employees Lewis Mobley, Jerome Hammond, and Jorge Huff in violation of Section 8 (a) (5) and (1) of the Act."

Amended Remedy

Having found that the Respondent engaged in unfair labor practices in violation of Section 8 (a) (5), (3), and (1) of the Act, we shall order it to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a) (5) and (1) of the Act by unilaterally changing its work rules to require employees to work both the morning and afternoon shifts, we shall order the Respondent to cease and desist from unilaterally instituting any such work rule. Affirmatively, we shall order the Respondent to rescind the rule and to bargain with the Union about any future implementation of any such work rules governing employees represented by the Union.

We shall also order the Respondent to fully restore the status quo ante by expunging from the files of employees all memoranda, reports, and other documents that were given as a result of the changed rule and notify the affected employees, in writing, that this action has been taken. We shall also order the Respondent to offer Lewis Mobley, Jerome Hammond, and Jorge Huff immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the changed work rule, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New*

Appendix C

Horizons for the Retarded, 283 NLRB 1173 (1987).[13]

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by indefinitely suspending employee Oliver Hooks because of his union activities, we shall order the Respondent to offer him full and immediate reinstatement and to make him whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him, as prescribed in *F. W. Woolworth Co.*, above, with interest as computed in *New Horizons for the Retarded*, above.

Order

The National Labor Relations Board orders that the Respondent, Tuskegee Area Transportation System, Atlanta, Georgia, its officers, agents successors, and assigns, shall

1. Cease and Desist From

(a) Interrogating employees about their union activities and

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13. As discussed in *Great Western Produce*, above, 299 NLRB No. 154, slip op. at 9, a respondent employer may avoid having to reinstate and pay backpay to an employee discharged pursuant to an unlawfully instituted rule or policy if the employer demonstrates that it would have discharged the employee even in the absence of that rule or policy. The circumstances surrounding the terminations of Mobley, Hammond, and Huff have been fully litigated. In view of our adoption of the judge's findings that the November 28 letter effectively terminated the employees — including his rejection of the Respondent's defenses — we find that Mobley, Hammond, and Huff are entitled to reinstatement and backpay.

However, in view of the alleged closure of the Respondent's business in July 1991, matters regarding backpay and reinstatement shall be left to compliance. Also in view of the alleged closure, we shall require the Respondent to mail to each of the unlawfully terminated employees a copy of the attached notice marked "Appendix".

sentiments, and the union activities and sentiments of other employees.

(b) Threatening employees with plant closure or other reprisals for engaging in union activity or choosing Amalgamated Transit Union, Local 1600 to represent them for purposes of collective bargaining.

(c) Soliciting grievances from employees and promising or impliedly promising to remedy the grievances in order to dissuade employees from engaging in union activities.

(d) Indefinitely suspending employees because of their activities on behalf of support for the Union.

(e) Unilaterally changing work rules by requiring employees to work both morning and afternoon shifts, and thereby effectively terminating employees.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and cease giving effect to the November 28, 1989 change in work rules requiring employees to work both the morning and afternoon shifts, and bargain with the union about any future implementation of any such rule.

(b) Remove from its files any reference to the unlawful indefinite suspensions or terminations of Oliver Hooks, Lewis

Mobley, Jerome Hammond, and Jorge Huff, and notify the employees in writing that this has been done and that it will not use the evidence removed against them in any way.

(c) Offer Oliver Hooks, Lewis Mobley, Jerome Hammond, and Jorge Huff immediate and full reinstatement to their former jobs or, if those jobs no longer exist, the substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits resulting from their indefinite suspensions or terminations in the manner set forth in the amended remedy section of the decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Mail to each of the terminated employees a copy of the attached notice marked "Appendix".[14]

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. August 14, 1992

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14. If this order is enforced by a judgment of a United States of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix C

James M. Stephens, Chairman

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Appendix C

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union activities and sentiments and the union activities and sentiments of other employees.

WE WILL NOT threaten employees with plant closure or other reprisals for engaging in union activity or choosing Amalgamated Transit Union, Local 1600 to represent them for purposes of collective bargaining.

WE WILL NOT solicit grievances from employees and promise or impliedly promise or impliedly promise to remedy the grievances in order to dissuade employees from engaging in union activities.

Appendix C

WE WILL NOT indefinitely suspend employees because of their activities on behalf of or support for the Union.

WE WILL NOT unilaterally change work rules by requiring employees to work both morning and afternoon shifts, thereby effectively terminating employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and cease giving effect to the November 28, 1989 change in work rules requiring employees to work both the morning and afternoon shifts, and we will bargain with the Union about any future implementation of any such rule.

WE WILL remove from our files any reference to the unlawful indefinite suspensions and terminations of Oliver Hooks, Lewis Mobley, Jerome Hammond, and Jorge Huff and we will notify them in writing that this has been done, and that we will not use the evidence removed against them in any way.

WE WILL offer immediate and full reinstatement to Oliver Hooks, Lewis Mobley, Jerome Hammond, and Jorge Huff to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their indefinite suspensions and terminations, less any net interim earnings, plus interest.

Appendix C

TUSKEGEE AREA TRANSPORTATION SYSTEM

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 101 Marietta Street NW, Suite 2400, Atlanta, Georgia 30323-3301, Telephone # 404—331—2886.

APPENDIX D — SUPPLEMENTAL DECISION OF THE NATIONAL LABOR RELATIONS BOARD DATED MARCH 6, 1992

UNITED STATES OR AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TUSKEGEE ARE TRANSPORTATION SYSTEM

and

OLIVER HOOKS, JR., An Individual

and

AMALGAMATED TRANSIT UNION LOCAL 1600

Frank F. Rox, JR., Esq.,
Atlanta, GA,
For the General Counsel

Velma L. Jackson, Esq.,
Pittsburgh, PA,
for the Respondent

SUPPLEMENTAL DECISION

On May 7, 1991, I issued a Decision in this proceeding find that Tuskegee Area Transportation System (TATS), herein called Respondent, violated Sections 8 (a) (1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act. I found that Respondent did so by interrogating employees about their union activities and sentiments, and the union activities and

sentiments of fellow employees; by threatening employees with reprisals, including plant closure, for engaging in union activities; by soliciting grievances from employee Oliver Hooks because of his activities on behalf of, or support for, Amalgamated Transit Union, Local 1600, herein called the Union; by unilaterally changing the work schedules of employees and thereby terminating employees Louis Mobley, Jerome Hammonds, and Jorge Huff, without notifying the Union or giving it an opportunity to bargain, and in part because the named employees supported the Union. I ordered that Respondent cease and desist from such unlawful activities, and I ordered Respondent to take certain affirmative action to remedy these violations of the act.

Respondent filed exceptions to my Decision with the Board. On November 19, 1991, the Board issued an Order remanding this proceeding to me for a limited purpose as indicated below. The Board noted that in finding Respondent had unilaterally changed the work schedules of employees, thereby terminating Mobley, Hammond, and Huff without notifying the Union or giving it an opportunity to bargain about such matters, I quoted and relied in part on a letter dated November 28, 1989, which was distributed to employees on that date. Such a letter was indeed distributed to employees but from a similar letter given to Reginald Wall, who was a statutory supervisor. Since I appeared to reach certain conclusions and make certain credibility resolutions on the bases of the letter quoted, the Board remanded this preceding to me for re-analysis of the evidence "in light of all the letters sent by the Respondent."

First, I note that the remand does not affect my findings that Respondent unlawfully interrogated employees with reprisals, including plant closure, for engaging in union activities; solicited grievances from employees; or terminated employee Oliver Hooks

because of his activities on behalf of Amalgamated Transit Union, Local 1600. All of those findings are undisturbed and serve as the backdrop for Respondent's unilateral change of employee work schedules.

I correctly stated in my earlier Decision that on November 28, 1989, Respondent distributed a letter to employees notifying them of a "cutback in staff." The letter sent to supervisor Reginald Wall, which I quoted in my earlier Decision, is very similar to but slightly different from the letter given to statutory employees. The letter to supervisor Wall states a specific date of December 8, 1989, on which his position "is being phased out." The letters to statutory employees Hammond and Huff state in their entirety:

> I am writing this letter to inform you that due to the increased cost of workmen's compensation insurance and TATS inability to secure an increase in operating capital from GLI, we must cut back in staff by employing persons who can work both the morning and evening shifts. If you feel that your schedule will allow you to work both shifts, please contact me immediately for consideration. If not, you will be allowed (sic) to work until a replacement if (sic) found.
>
> I want to take this opportunity to thank you for the service you have rendered to the Tuskegee Area Transportation System, and I look forward to a continued (sic) good working relationship.

As I stated in my earlier Decision, Respondent argued in its post-

trial brief that "this letter was intended only to generate discussion . . ." I noted that Respondent appears to argue by implication that the letter did not effect a change in working conditions of employees. I rejected that argument, and I do so again. The letter to Hammond and Huff, as well as the version given to supervisor Wall, states on its face that Respondent "must cut back in staff . . ." In the version of the letter given to statutory employees, it states, "We must cutback in staff by employing persons who can work both the morning and evening shifts." As I found in my original Decision, TATS was awarded a minority subcontract to provide morning and afternoon rush-hour bus service limited to only two routes of MARTA (Metropolitan Atlanta Rapid Transit Authority). Because Respondent has no work for drivers between the morning rush-hour and the afternoon rush-hour, Respondent hired full-time MARTA drivers who would work either morning or afternoons for Respondent when not scheduled to work with MARTA. There is no question Respondent knew that by limiting employment to persons who could work both the morning and evening shifts, its employment of full-time MARTA drivers would be eliminated. That is precisely why Respondent told employees, "If you feel that your schedule will allow you to work both shifts, please contact me immediately for consideration." That Respondent was in fact terminating these full-time MARTA drivers from its employment is shown as well by the statement that if they are able to meet Respondent's time demands, they should contact Respondent "immediately *for consideration.*" I reiterate my earlier finding that the letters distributed to employees on November 28 effectively terminated their employment. For the reasons stated in my earlier Decision, I find that this unilateral change violated Section 8(a) (1) and (5) of the Act.

Also for the reasons stated in my earlier Decision, I reject the claim by John Wright, Respondent's owner, that he intended to

retain all the MARTA drivers, but to work them on charter bus routes. The letters to employees say absolutely nothing about being retained in different positions. Further, as I indicated in my earlier Decision, this claim by Wright is totally inconsistent with the letter to employees which state that "Due to the increased cost of worker's compensation insurance . . . we must cut back in staff. . . ."

Finally I reject for the reasons stated in my earlier Decision Respondent's claim that MARTA drivers were never terminated but were simply permanently replaced when they went on strike on December 4. As I stated therein, Wright is simply not a credible witness, and I reject his contrived testimony regarding the strike. My assessment of Wright's credibility is in no way dependent on the phraseology or content of the November 28 letters to employees, but rather on my observation of him as a witness. I withdraw my finding that the letters to employees effectively terminated their employment as of December 8, but I reiterate my finding that Respondent unilaterally effected the change in working conditions on November 28 which had the effect of constructively terminating all of Respondent's employees who worked for MARTA. Further, I reiterate my finding that the picketing by employees on December 4 was actually the result of, and in pretest of, Respondent's unlawful, unilateral action which resulted in their termination. Finally, for the reasons stated in my earlier Decision, I find that the November 28 change in operation was motivated at least in part by a discriminatory intent. The evidence supporting that conclusion is discussed in my earlier Decision and is in no way dependent on the phraseology or content of the November 28 letter to employees. In conclusion, or content of the November 28, 1989, Respondent discriminatorily and unilaterally changed the work schedules of employees which resulted in the termination of employees Mobley, Hammond, and

Huff, and Respondent thereby violated Sections 8 (a) (1), (3), and (5), of the Act.

This Supplemental Decision does not require any modification of my earlier Decision regarding Conclusions of Law, the remedy, the remedial Order, or the attached Notice to Employees. Accordingly, those matters remain unchanged[1]

Dated at Washington, D.C. March 6, 1992

Philip P. McLeod
Administrative Law Judge

1. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objection to them shall be deemed waived for all purposes.

APPENDIX E — DECISION OF THE NATIONAL LABOR RELATIONS BOARD DATED MAY 7, 1991

JD(ATL)—19—91
Tuskegee, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

Cases 10-CA-24176
10-CA-24554

TUSKEGEE AREA TRANSPORTATION SYSTEM

versus

OLIVER HOOKS, JR., An Individual

and

AMALGAMATED TRANSIT UNION, LOCAL 1600

Frank F. Rox, Jr., Esq.,
Atlanta, GA, for the General Counsel

Velma L. Jackson, Esq.,
Pittsburgh, PA, for the Respondent

DECISION

PHILIP P. McLEOD, Administrative Law Judge

Appendix E

Statement of the Case

I heard these cases on August 1 and 2, 1990, in Atlanta, Georgia. The charge in Case 10-CA-24176 was filed by Oliver Hooks on June 7, 1989. A complaint and notice of hearing issued on August 22, 1989, alleging that Tuskegee Area Transportation System (TATS), herein called Respondent, violated Sections 8 (a) (1) and (3) of the National Labor Relations Act, herein Called the Act. On January 18, 1990, Amalgamated Transit Union, Local 1600, herein called the Union, filed a charge in Case 10-CA-24554. This was later amended on January 31 and February 23, 1990. On March 2, 1990, an order consolidation cases and consolidated complaint issued in Cases 10-CA-24554 alleging, inter alia, that Respondent violated Sections 8(a) (1), (3), and (5) of the Act by interrogating employees about their union activities, threatening employees, soliciting employee's grievances, discharging Oliver Hooks, and unilaterally changing the work schedules of employees, thereby resulting in the terminations of the work schedule of employees, thereby resulting in the terminations of Lewis Mobley, Jerome Hammonds and Horge Huff. In its answer to the consolidated complaint, Respondent denied having its answer to the consolidated complaint, Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, Counsel for General Counsel and Respondent both filed timely briefs with the undersigned which have been duly considered.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

Appendix E

Findings of Facts, Analysis, and Conclusions

I. JURISDICTION

Tuskegee Area Transportation System began business in 1986 by establishing a system of three buses in Tuskegee, Alabama. In July 1988, TATS entered into a minority subcontract agreement with Greyhound Lines, Inc., to provide rush-hour bus service on two routes of the Metropolitan Atlanta Rapid Transit Authority (MARTA). TATS also operates a charter bus service with frequent trips in and between Georgia and Alabama. Respondent admits and stipulated to the Board having statutory jurisdiction. Respondent asserts, however, that it does not meet the Board's discretionary jurisdictional standards. While Respondent attempted to develop this issue to some extent at trial, its post-trial brief is virtually silent on this issue.

Based on the record herein, I find that Respondent is precluded from raising a lack of discretionary jurisdiction as a defense. The Union filed a petition for an election among Respondent's employees in Case 10-RC-13901. Thereafter, a hearing was conducted to resolve any issues relating to the representation case. At the trial herein, John Wright, Respondent's owner, claimed that he did not receive the petition or notice of the representation case hearing. Wright persisted in his denial even though he was shown that he had corresponded with the Board's Regional office approximately 10 days prior to the representation case hearing. Following the hearing, the Regional Director of Region 10 issued a Decision and Direction of Election. Wright denied ever receiving this, although he admitted receiving election notices from the Board. Wright concedes, too, that he was present for the Board-conducted election held on September 6, 1989.

Wright also attempted to claim that he did not receive service of the charges underlying this unfair labor practice proceeding. He claimed, for example, that he does not sign for certified mail. Even after being confronted with his signature on the return receipts for the amended charge in Case 10-CA-24554 and the consolidated complaint, Wright equivocated concerning service of these documents. Simply stated, Wright is one of the least credible witnesses ever to appear before me.

Respondent did not file a request for review of the Regional Director's assertion of jurisdiction in the Decision and Direction of Election. It is well-settled that although the existence of statutory jurisdiction may be raised at any time, the issue of discretionary jurisdiction must be timely raised. When Respondent has not sought to contest the Regional Director's assertion of jurisdiction by filing a request for review of his decision, an employer may not raise the issue of discretionary jurisdiction during a subsequent unfair labor practice proceeding. *Pollack Electric Co., Inc.*, 214 NLRB 970 (1974); see also *Pickle Bill's, Inc.*, 229 NLRB 1091 (1977).

Even if Respondent could assert lack of jurisdiction as a defense at this late date, I would find counsel for General Counsel has carried its burden of proof on that issue. The gross annual value of Respondent's contract with Greyhound to operate the two MARTA routes is $222,333.00. The record is clear that Respondent receives substantial revenues from the operation of charter bus services. Wright himself admitted that charters for two schools in Alabama alone gross an average of $30,000. Wright failed to produce subpoenaed documents which would reflect revenue receive from its charter business. His only explanation for not doing so was that his business office in Tuskegee, Alabama,

was destroyed by fire in July 1989.[1] Considering the gross annual value of the contract between Respondent and Greyhound for the two MARTA routes, and in view of Wright's own admission concerning gross revenues received from seasonal charters, I would find that counsel for General Counsel has met its burden of proof and that Respondents meets the Board's $250,000.00 discretionary standard.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Amalgamated Transit Union, Local 1600, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Since entering into the minority subcontract agreement with Greyhound Lines, Inc. in July 1988, TATS has provided morning

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1. When questioned by me on the point, Wright claimed that no income tax records exist reflecting revenue for the business since 1989 because he has not filed income tax returns for at least the past two years. I encourage the Board to refer this matter to the Internal Revenue Service to determine whether Wright and/or TATS have filed required income tax returns. If not, I would encourage them to take appropriate action. If, on the other hand, Wright has in fact filed required returns, then I would encourage the Board to consider appropriate actin against Wright for perjury before me.

and afternoon rush-hour bus service on MARTA routes 148 and 718 in metropolitan Atlanta. During the interim between the morning rush-hour, TATS has no work for the drivers. In order to obtain qualified drivers, Respondent hired full-time MARTA drivers, who, depending on their driving schedules with MARTA, would drive the morning rush-hour for Respondent, while MARTA drivers with morning routes worked the afternoon rush-hour for Respondent.

B. *Union Activity*

It is undisputed that Oliver Hooks was the driving force behind the Union organizing campaign of Respondent's employees. In November 1988, Hooks spoke with several of Respondent's drivers about the possibility of union representation. As a MARTA driver, Hooks had been job steward for Local 732 of the Union for about 2-1/2 years. Hooks talked to Respondent's drivers, solicited support, and made whatever contacts were necessary with the Union. In March 1989, after securing union authorization cards, the Union demanded recognition from Respondent.

I credit Hooks that in November 1988, he informed Wright he was signing up employees for the Union. Hooks told Wright that employees of Greyhound Transit that run MARTA routes were discussing a union. Hooks testified candidly that Wright at first replied, "go ahead and do it. Greyhound's got plenty of damn money." According to Hooks, he went on to tell Wright that "all the employees," including those of Greyhound subcontractors were signing up to show solidarity. I do not credit Wright's claim that he was unaware Hooks was involved with the Union prior to Hooks' March 1989 termination. I do, however, credit Wright to the limited extent that he was unaware union activity was directed at

his own employees until he received the Union's demand for recognition on March 29, 1989. Wright admitted he was aware of organizing activity as early as December 1988, but he testified he was assured by Hooks that the organizing campaign would not be directed toward his employees but only toward Greyhound. Whether he was told this by Hooks, or by other employees, or was simply mistaken, I find that Wright was unaware union activity involved his employees until March 29.

The remaining discriminatees, Lewis Mobley, Jerome Hammonds, and Jorge Huff, all supported the Union and signed authorization cards. All three employees were full-time MARTA drivers.

C. *The Union's Demand and Respondent's Interrogation of Employees*

The Union sent Respondent a letter dated March 27, 1989, demanding recognition. This letter was received by Respondent on March 29.

Immediately after receiving the Union's demand letter, Wright telephoned employees at home. Employee McKinley Woods, who testified about his conversation with Wright, incorrectly placed this conversation on March 28, while the demand was not received until March 29. I do not place any great significance on this minor discrepancy since it is clear from the testimony of both Woods and Wright that the conversation did take place and occurred after Wright received the Union's demand. Woods testified credibly that Wright asked if he "was aware that a union was being formed" and whether Woods was "for the union coming in against (Respondent)." Woods told Wright he supported the Union. Wright told Woods that he could not understand why the

employees would support the Union in light of Wright's "open-door policy." Woods testified credibly Wright stated that Respondent did not "need anybody coming telling (him) what to do because it would only cause attitudes and friction." Wright then told Woods, "I am the boss of the company and I can close it down." During this conversation, Wright also asked Woods if there were "any problems at TATS." Woods replied that he would like to know how Wright comes up with the pay scale. As Woods pursued the issue, Wright told Woods that he could not discuss anyone else's pay. Woods testified that he never received an answer to his question about the pay scale.

Wright admitted telephoning employees about the Union. Wright admitted further that the purpose of these calls was to ask what were "the reasons for" the Union's demand letter and to find out "if (employees) were participating" in the organizing campaign. Wright admitted. "I asked if they were participating . . ." According to Wright he did this because he had been assured by employees and by Hooks that the Union organizing campaign would not be directed toward his employees but only toward Greyhound. Although Wright denies threatening employees or engaging in any unlawful activity in these telephone calls, Wright even corroborates Woods' testimony to some extent. Wright confirms he mentioned his "open-door policy" and further admits telling employees that Respondent would "be accordingly." Wright attempted to soften his statement about closing of the business by claiming that he was merely predicting economic consequences of unionization.

To the extent there is a discrepancy between Woods and Wright, I credit Woods. Regardless of his personal motivation for calling the employees, I find that Wright individually interrogated employees concerning their union activities and sympathies as

well as those of other employees.[2] I find as well that Wright solicited grievances from Woods and impliedly threatened plant closure. In its post-trial brief, Respondent argues that there was no solicitation of grievances and no violation of the Act since Woods admitted he was not able to receive an answer to his question about the pay scales. Whether employees have their questions answered is simply not relevant. The violation stems from Respondent soliciting the grievances and impliedly promising to remedy them, whether or not it actually remedies them.

After telephoning employees individually and asking them if they were participating in the Union campaign, Wright prepared a document dated March 31, 1989, which he distributed to employees requiring them to sign a statement either confirming or denying their support for the Union. Employee Woods testified credibly that even after he indicated his support for the Union and returned the statement form to Wright, Wright questioned him further about why he would want a union.

I find that both the poll of employees and the further questioning of Wood constitutes further unlawful interrogation of employees about their union activities and sentiments. Respondent's subjective motivation for interrogating employees is not determinative of its lawfulness. The act of interrogating employees individually about their union activities and sentiments must be viewed objectively as itself being intimidating and coercive to employees. The Board has recognized certain exceptions to this general proposition, of course, where such interrogation is directed at the case here, where Respondent was

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2. I credit Reggie Wall's testimony that in a conversation with Wright, Wright asked if discriminatees Mobley, Hammond, and Huff knew Oliver Hooks or if they were "tied up with this union mess."

under the impression that Union activities were not being directed toward nor, or engaged in, by its own employees. I find the Wright's interrogation of employees violated Section 8 (a) (1) of the Act.

D. *Termination of Oliver Hooks*

On or about December 8, 1988, Respondent received a memorandum from MARTA concerning a customer complaint about Oliver Hooks. Hooks was given an informal warning. As a result of a later complaint, on March 16, 1989, Wright suspended Hooks as the regular driver on Route 718 and placed him on the "extra-board." After March 16 and before Hooks' termination on March 31, however, Wright used Hooks on several occasions to drive Route 718. On March 31, two days after receiving the Union's demand letter, and after interrogating other employees and requiring them to sign the poll indicating whether they supported the Union, Wright terminated Hooks.

Wright testified that he terminated Hooks because of the customer complaints against Hooks and not because of any union activity. In fact, Wright testified at one point he was not even aware that Hooks was involved with the Union prior to Hooks' suspension. I do not credit Wright in this regard. Elsewhere Wright admitted that Hooks was "the cause of the Union coming." More significantly, Wright testified that prior to receiving the Union's demand, "I had been informed by Oliver Hooks and the other workers . . . that they had agreed . . . they would not organize against TATS because they had no grievances or problems with TATS Corporation." It is quite apparent from Wright's testimony he was fully aware Hooks was heavily engaged in union activity, but was under the impression that it was not directed at his own employees. When Wright received the Union's demand, he was

obviously shocked. He interrogated individual employees and required each employee to sign a poll acknowledging whether they supported the Union. He also took immediate action to terminate Hooks.

Wright not only testified that he terminated Hooks because of customer complaints, but that he was required to terminate Hooks because an "ultimatum to discharge Hooks allegedly came from Darice Gamble, MARTA's Contract Services Coordinator." Gamble was called as a witness by counsel for General Counsel on rebuttal. Gamble unequivocally denied instructing Respondent to terminate Hooks. Gamble testified that after referring the customer complaint to Respondent, she was not informed of the results of the alleged investigation by Wright. Nor was Gamble aware that Hooks had been discharged. After being questioned by both counsel for General Counsel and counsel for Respondent, I also questioned Gamble once more:

> Q. (The Court) Are you absolutely positive that you did not instruct Wright to discharge Mr. Hooks?
>
> A. (The Witness) Absolutely positive. I did not instruct them to terminate him.

I found Gamble totally candid and credible. I conclude that she never directed or even suggested to Respondent that it terminate Hooks. I conclude as well that Wright simply lied about that in order to try to build a smoke screen behind which he might hide. The false testimony proffered by Wright itself warrants an inference that his motive for terminating Hooks was unlawful.

What evidence is available also reflects Respondent's

disparate treatment in terminating Hooks. Wright himself admitted that he has received customer complaints about other drivers. When pressed, Wright admitted that employee Ada Harmon received numerous complaints ranging from being late for runs to failing to complete her routes. Despite this, Respondent did not impose any discipline whatsoever on Harmon. The only explanation advanced by Wright for the difference was that he was not directed to take action against her but that he was directed to discharge Hooks, a claim which I find completely false. I note, too, that Respondent failed to produce subpoenaed records in this case, including "customer complaints" about employees. Failing to produce these subpoenaed documents precluded counsel for General Counsel from further demonstrating disparate application of discipline. Respondent's failure to produce the subpoenaed records warrants the drawing of an adverse inference against Respondent that if they had been produced, the records would not support its position but rather would demonstrate further disparate treatment.

Considering all of the evidence, I conclude that when Respondent received the Union's demand, Wright seized upon the customer complaint as rationalization to terminate Hooks. Wright had received the customer complaint at least two weeks before the discharge, and during that time allowed Hooks to work. Seizing upon the customer complaint as reason to terminate Hooks represents a classic case of pretext. Wright went too far, however, in trying to shift the blame for the discharge decision to someone else by claiming he had received an "ultimatum" to discharge Hooks, a claim which was shown to be patently false. I conclude and find that Respondent discharged Hooks because of his union activity, and Respondent thereby violated Section 8 (a) (1) and (3) of the Act.

Appendix E

E. *The Change in Schedules*

Following a Board-conducted election in which employees voted unanimously to be represented by the Union, the Board certified the Union on September 18, 1989.

On or about November 16, 1989, Respondent received notice through its premium statement of an unannounced increase in Workers Compensation Insurance. Wright testified that the increase in premiums was from approximately $2,400.00 to $11,600.00. Documents introduced by Respondent, however, reflects the actual premium cost to be only $6,800.00, not $11,600.00. Nevertheless, the fact that there was an increase is not disputed.

Wright testified that he was immediately faced with the decision to reduce expenses or go out of business. As Respondent states in its post-trial brief, "*one alternative* to reducing expenses . . . was to have drivers work both the morning and afternoon shift." (Emphasis supplied.)

By letter dated November 28, and distributed to employees on that date, Wright informed the MARTA drivers, "Due to the increased cost of worker's compensation insurance . . . we must cut back in staff. Therefore, it is regrettable but effective December 8, 1988, your position is being phased out." In its post-trial brief, Respondent appears to argue by implication that the letter did not effect a change in working conditions of employees. If indeed this is Respondent's argument, it is rejected. Nowhere did the letter state or even imply that Respondent was only trying to generate discussion. On its very face, the letter notified employees that Respondent "must cut back in staff . . ." It thanked those employees to whom it was given "for the service you have

rendered" and wished them "the very best in your future endeavors." This letter quite clearly terminated their employment, and I so find.[3] There is no dispute that this change in operation was made without notice to or consultation with, the Union. Board law is clear that such unilateral changes based on economic considerations violate Section 8 (a) (1) and (5) of the Act. *LaPeer Foundry and Machine, Inc.*, 289 NLRB No. 126 (1988). Counsel for General Counsel contends, however, that the change was also motivated by discriminatory intent, and the parties spend considerable portions of their post-trial briefs discussing the motive for Respondent's change in operations.

The November 28 change in operations affected only the part-time MARTA drivers who also happened to be the Union supporters. Wright testified that it was his intent to retain all the MARTA drivers, but to work them on charter bus routes. I reject this claim altogether. It is not only inconsistent with the letter to employees dated November 28, but statements made by Wright to employees credited above. Be that as it may, Wright claims that MARTA drivers were never terminated but were simply permanently replaced when they went on strike on December 4. Wright claimed that he received a telephone call warning him that MARTA drivers were going to go on strike on December 4, and, as a result, Greyhound instructed him to "move the equipment." Wright also testified that prior to any picketing activity, he was informed by Greyhound to obtain replacement drivers to take the jobs of MARTA drivers.

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3. I note, too, that Wright's statements to employees clearly reflect that a change had been made and that Wright was not simply looking for ideas. Employee Lewis Mobley testified credibly that when he asked Wright if the letter meant he was fire, Wright replied, "well, unless you can work out something where you can work in the evening time." On cross-examination, Mobley again testified credibly that Wright informed him, "I got to let you go. We've got to cut back."

Appendix E

On cross-examination, Wright admitted that neither the Union nor any of the discriminatees ever informed Respondent that a strike was planned for December 4. Nevertheless, when the discriminatees arrived to work on December 4, Respondent had not only moved the equipment but already hired replacements for the MARTA drivers. While there was some confusion even among employee witnesses themselves as to the exact time they began picketing, all of these witnesses testified that picketing did not began until after Wright departed from Respondent's facility carrying the replacement workers to the hidden buses. Wright is simply not a credible witness, and I reject his contrived testimony regarding the strike. I find that Respondent unilaterally effected the change in working conditions on November 28 which had the effect of constructively terminating all of Respondent's employees who worked for MARTA effective December 8. I find that the picketing by employees was actually the result of and in protest of Respondent's unlawful unilateral action. In its post-trial brief, Respondent argues that "a dissident group of employees, who are now the petitioners, unlawfully and without notice to the Union went on strike on December 4. . . ." Respondent makes no clear argument in what way the strike or picketing was unlawful. Quite obviously the Union and Respondent have never negotiated any "no-strike" contract provision, and the mere fact that employees did not get permission from or notify the Union does not make their strike unlawful. Contrary to Respondent's argument that the strike was unlawful it was quite clearly a spontaneous unfair labor practice strike precipitated by Respondent's unlawful unilateral change in the work schedules of employees which resulted in the termination of MARTA drivers who worked for Respondent and who supported the Union.

Wright's own testimony also evidences that the November 28 change in operations was motivated at least in part by a

discriminatory intent. When asked if the change in operations was due solely to the insurance increase, Wright replied in the negative. Wright testified:

> A. (By Wright) . . . That's because the morale of the drivers had dropped to the point where there was a lot of harassment going on and a lot of other intimidating activities going on. So I had to make a move at that particular time.
>
> Q. (By Counsel for General Counsel) What kind of intimidating activities were going on, Mr. Wright?
>
> A. The non-MARTA drivers were being called incompetent fools, dummies and this kind of thing from the MARTA drivers because they did not —
>
> Q. Join the Union?
>
> A. Right.

It is clear from Wright's testimony that the Union activity of MARTA drivers was considered by Respondent to be causing morale problems. As Wright stated, "so I had to make a move at that particular time," and he did so by issuing the letter dated November 28. I find merit to Counsel for General Counsel's argument that an unlawful and discriminatory motive was at least part of the reason for Wright's action on November 28 which resulted in termination of MARTA drivers in the circumstances of this case, it is not necessary to determine whether the employees

might have been terminated in any event even without an unlawful motive since their termination was unilateral and also violated Section 8 (a) (1) and (5) of the Act. I find that On November 28, 1989, Respondent discriminatorily and unilaterally changed the work schedules of employees which resulted in the termination of employees Mobley, Hammonds, and Huff, and Respondent thereby violated Section 8 (a) (1), (3), and (5) of the Act.

Conclusions of Law

1. Respondent, Tuskegee Area Transportation System, is, and has been at all time material herein, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Amalgamated Transit Union, Local 1600, is, and has been at all times material herein, a labor organization within the meaning of Section 2 (5) or the Act.

3. John Wright interrogated employees about their union activities and sentiments, and the union activities and sentiments of fellow employees; and Respondent thereby violated Section 8 (a) (1) of the Act.

4. John Wright threatened employees with reprisals, including plant closure, for engaging in union activities; and Respondent thereby violated Section 8 (a) (1) of the Act.

5. John Wright solicited grievances from employees and impliedly promised to remedy them in order to discourage employees from engaging in union activities, and Respondent thereby violated Section 8 (a) (1) of the Act.

6. Respondent terminated employee Oliver Hooks because of

his activities on behalf of, or support for, the Union; and Respondent thereby violated Section 8(a) (1) and (3) of the Act.

7. After the Board certified the Union on September 18, 1989, as the exclusive bargaining representative of its employees, Respondent unilaterally changed the work schedules of employees and thereby terminated employees Lewis Mobley, Jerome Hammonds, and Jorge Huff, without notifying the Union or giving it an opportunity to bargain about such matters; and in part because the named employees supported the Union; and Respondent thereby violated Sections 8 (a) (1), (3), and (5) of the Act.

8. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2 (6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8 (a) (1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Board held in *LaPeer Foundry,* supra, that an unlawful failure to negotiate over a layoff decision in violation of Section 8 (a) (5) of the Act requires that the employer's backpay liability run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent position or have secured equivalent employment elsewhere. Backpay shall be

based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, with appropriate interest.

Respondent shall be ordered to restore the status quo and by restoring the conditions it unilaterally changed and by continuing them in effect until it fulfills its bargaining obligation, and to make employees whole for any loss of wages or other benefits due to Respondent's unilateral actions with interest, in accordance with *Ogle Protection Service*, 183 NLRB 682 (198).

Accordingly, upon the foregoing finding of fact and conclusions of law, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:

ORDER[4]

Respondent, Tuskegee Area Transportation System, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities and sentiment, and the union activities and sentiments of other employees.

(b) Threatening employees with plant closure or other

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4. If no exceptions are filed as provide by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

reprisals for engaging in union activity or choosing the Union to represent them for purposes of collective bargaining.

(c) Soliciting grievances from employees and promising or impliedly promising to remedy such grievances in order to dissuade employees from engaging in union activities.

(d) Discharging employees because of their activities on behalf of, or support for, the Union.

(e) Unilaterally changing working conditions by requiring employees to work both morning an afternoon shifts and unilaterally laying off employees without notifying the Union and giving it a meaningful opportunity to bargain about such matters.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Offer immediate and full reinstatement to Oliver Hooks, Lewis Mobley, Jerome Hammonds, and Jorge Huff to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(b) Make whole Oliver Hooks, Lewis Mobley, Jerome Hammonds, and Jorge Huff for any loss of earnings or other benefits they may have suffered by reason of discrimination against them by paying them a sum of money equal to the amount they normally would have earned from the date of the

discrimination against them to the date of Respondent's offer of reinstatement, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

(c) Expunge from its files any reference to the termination or discharges of any of the employees named above and notify them in writing that this has been done, and that evidence of the unlawful action against them will not be used as the basis for future personnel actions against them.

(d) Post at its Atlanta, Georgia, facilities, copies of the attached notice marked "Appendix".[6] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous place including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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5. Under *New Horizons*, interest is computed at the "short-term Federal Rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

6. If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix E

(f) Notify the Regional Director for Region 10 in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

Dated at Washington, D.C. May 7, 1991

Philip P. McLeod
Administrative Law Judge

Appendix E

"APPENDIX"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through a representative of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities

WE WILL NOT interrogate employees about their union activities and sentiments, or the union activities and sentiments of other employees.

WE WILL NOT threaten employees with plant closure or other reprisals for engaging in union activity or choosing the Union to represent them for purposes of collective bargaining.

WE WILL NOT solicit grievances from employees and promise or impliedly promise to remedy such grievances in order to dissuade employees from engaging in union activities.

Appendix E

WE WILL NOT discharge employees because of their activities on behalf of, or support for, the Union.

WE WILL NOT unilaterally change working conditions by requiring employees to work both morning and afternoon shifts or unilaterally lay off employees without notifying the Union and giving it a meaningful opportunity to bargain about such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise or their rights guaranteed by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to Oliver Hooks, Lewis Mobley, Jerome Hammonds, and Jorge Huff to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL make whole Oliver Hooks, Lewis Mobley, Jerome Hammonds, and Jorge Huff for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they normally would have earned from the date of the discrimination against them to the date of our offer of reinstatement, less net interim earnings, with appropriate interest.

WE WILL expunge from our files any reference to the termination or discharges of any of the employees named above and notify them in writing that this has been done, and that evidence of the unlawful action against them will not be used as the basis for future personnel actions against them.

Appendix E

TUSKEGEE AREA TRANSPORTATION SYSTEM
(Employer)

DATED: _____ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office , 101 Marietta Tower, Suite 2400, 101 Marietta Street, N.W., Atlanta, Georgia 30323-3301. Telephone: (404) 331-2886.

APPENDIX F — RELEVANT STATUTE

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to

vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.